Supreme Court, U.S.
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No. 98-155

In the
Supreme Court of the United States
October Term, 1998

Lori A. Todd,
Petitioner,

vs.

Ortho Biotech, Inc.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is an employer vicariously liable under Title VII of the Civil Rights Act of 1964 for a one-time incident of sexual harassment committed by a high-level employee who had no supervisory authority over the plaintiff, when the employer (a) could not have foreseen the offensive conduct, (b) had a sexual harassment policy in place, and (c) upon promptly learning of the incident, took proper and effective remedial action?

RULE 29.6 STATEMENT

Ortho Biotech, Inc., is a wholly owned subsidiary of Johnson & Johnson.

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Ortho Biotech, Inc. ("Ortho") respectfully asks that the Court deny the petition filed by Lori Todd ("Todd" or "Petitioner") for a writ of certiorari. No aspect of this case warrants review by this Court. In apparent recognition of this fact, Petitioner asks that, rather than address the merits of her claim, the Court vacate the judgment of the Court of Appeals and remand this case for further review by that court in light of this Court's recent decisions in *Faragher v. City of Boca Raton*, 524 U.S. ___ (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. ___ (1998). The Court should decline Petitioner's invitation to subject both the Court of Appeals and the parties to further proceedings. Contrary to Petitioner's fervent, albeit understandable, desire, neither *Faragher* nor *Burlington* involved (or purport to apply to) a single unforeseen incident of sexual harassment committed by an individual who did not have "immediate (or successively higher) authority over the employee," *Faragher*, slip op. at 29-30, and, accordingly, no purpose would be served by granting Petitioner's request.

STATEMENT OF THE CASE

This suit results from the attempted rape of Petitioner by James Moreland, who was at the time a high-level Ortho employee. In seeking a writ of certiorari, Petitioner continues her efforts to hold Ortho vicariously liable for Moreland's actions despite jury findings that Ortho could not have foreseen that Moreland would commit such an act, *see* Pet. App. A-57 to A-58,[1] and that, upon learning of the incident, Ortho took prompt, proper, and effective remedial action, Pet. App. A-61,

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[1] The following abbreviations will be used throughout this Brief: "Pet." to refer to the Petition for a Writ of Certiorari, "Pet. App." to refer to the Appendix thereto, "T." to refer to the transcript of the trial in this matter, and "Def. Ex." to refer to a Defendant's Exhibit.

which included terminating Moreland. *See* Pet. App. A-9, A-17. The relevant facts were carefully summarized by the Court of Appeals in its opinion and need not be restated here. *See Todd v. Ortho Biotech, Inc.*, 138 F.3d 733, 735-36 (8th Cir. 1998) (Pet. App. A-1 to A-18).[2] Certain facts do bear on the question posed by Petitioner, however, and they merit brief attention.

Ortho's Sexual Harassment Policy

In light of this Court's decisions in *Faragher* and *Burlington*, Petitioner suggests that Ortho lacked an appropriate policy regarding sexual harassment at the time of Moreland's attack. *See* Pet. 18-20. This issue was not the focus of the trial, and no question submitted to the jury directly addressed it. *See* Pet. App. A-57 to A-63 (special verdict form). It was litigated in the context of the state-law claim, however, and the Court of Appeals expressly noted in that context that "Ortho had a published policy against sexual harassment." Pet. App. A-15.

The record amply supports the conclusion that Ortho's sexual harassment policy was entirely satisfactory — even when viewed retrospectively through the prism of *Faragher* and *Burlington*. Ortho has maintained a policy prohibiting sexual harassment since its inception in 1986. T. 640-41. Ortho initially operated under the sexual harassment policy of its corporate predecessor, and in August 1991 published its own

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[2] Petitioner seeks review only of her Title VII claim and has expressly abandoned her claim under the Minnesota Human Rights Act, MINN. STAT. ch. 363. *See* Pet. 3. Accordingly, the Court of Appeals has had the last word on that matter, and the District Court opinion that was addressed solely to that claim, *see* Pet. App. A-34 to A-50, is of no consequence to the issue presented by Petitioner.

Personnel Policies and Practices Manual for use by Ortho managers. *Ibid.*

On July 17, 1992 — two months prior to Moreland's assault — Ortho's president sent a memo to all employees in which, among other things, he reinforced Ortho's commitment to providing a work environment free of harassment. Def. Ex. 1; *see* T. 639. Later that month, Craig Mangean, Ortho's director of employee relations and development, reinforced this message in a memorandum to all field employees. Def. Ex. 7. Mangean asked that employees direct complaints of sexual harassment to him, and promised to investigate all complaints immediately. *Ibid.* When, two days after the attack, Petitioner reported the incident to Ortho's director of management development, he immediately involved Mangean, *see* Pet. App. A-8, which set in motion the remedial action found by the jury to be "proper and effective," Pet. App. A-61 — a finding the Court of Appeals concluded was "well supported by the trial evidence." Pet. App. A-13; *see also infra* at 5.

Moreland Was Not Todd's Supervisor

Petitioner's attempt to fit this case within the holdings of *Faragher* and *Burlington* also involves a recasting of the facts regarding her employment relationship with Moreland. *See* Pet. 10-12. Specifically, Petitioner contends that vicarious liability is warranted because Moreland was "a 'supervisor,'" Pet. 10, and, in a wholly new twist, that she falsely but reasonably understood that he was her supervisor. Pet. 17.

In the District Court, Petitioner's Title VII claim rested on the contention that Moreland was "a supervisor," as opposed to being Todd's supervisor. *See* Pet. App. A-68 (jury is instructed that plaintiff "contends that Ortho Biotech is liable for Mr.

Moreland's sexual harassment because he was a supervisor at the time of the attack"); *see also infra* at 6-7 & n.3. As the Court of Appeals noted, the District Court, as prompted by Todd, "only required the jury to find that Moreland was an Ortho supervisor, not that he was Todd's supervisor." Pet. App. A-12. Ortho does not dispute that Moreland was a high-level employee, but, again in the words of the Court of Appeals, "[t]he fact is that Moreland was not in Todd's 'chain of command' when he assaulted her . . . ." *Ibid.*

At the time that Todd began her entry-level employment with Ortho, Moreland was in Todd's "chain of command," near the top of Ortho's six-tier sales organizatio[illegible]. *See* T. 189-90. By the time Todd met Moreland, Ortho had moved him out of this corporate hierarchy. By August 1992, one month prior to Todd's encounter with Moreland, Ortho's vice president of sales and marketing had become dissatisfied with Moreland's performance and demoted him to a position in which he had no supervisory authority over any of the employees in the sales organization. *See* T. 909-10, 912, 914-15, 1082-84; *see also* Def. Ex. 54. Before Todd met Moreland in September 1992, she understood that he was no longer Ortho's national sales manager and that he had been given different responsibilities. *See* T. 189, 191-92.

In effect, Todd seeks this Court's assistance in a *post hoc* revision of her trial strategy. The claim submitted to the jury turned solely on Moreland's role as "a supervisor" — not Todd's supervisor or her newfound mistaken understanding that Moreland was her supervisor. Todd and her counsel sought to have their claim submitted in this fashion (*see infra* n.3) — over Ortho's express objection, *see* T. 1297 — and this Court should not provide a forum in which parties disappointed with the outcome of their trial strategy may turn back the clock.

Ortho's Proper and Effective Remedial Action

The jury found that Ortho's response to Todd's report of Moreland's actions constituted "proper and effective remedial action." Pet. App. A-61. The Court of Appeals' review of the facts that support that finding is instructive. After hearing Todd's complaint regarding the incident, which had occurred at the Boston hotel at which Ortho was conducting a sales meeting, Ortho's representatives

> expressed shock and sympathy, asked Todd what she would like them to do, offered to move her to another hotel room, and helped her return home. In Minnesota, Ortho offered to pay Todd's uninsured therapy costs (which she declined); urged her to move her therapy day to a work day, with full pay; and granted her substantial paid leave. Ortho's senior management confronted Moreland when he returned from the sales conference, investigated Todd's complaint thoroughly, and fired Moreland when Todd's complaint was found to be credible. . . . By terminating this high-ranking minority employee with two decades of experience and no complaints on his record on the ground that he sexually harassed a relatively new employee, Ortho showed its commitment to preventing sexual harassment in its workplace, not timidity in the face of controversy.

Pet. App. A-16 to A-17.

The Litigation

Petitioner's Title VII claim was tried to a jury, which returned a special verdict that exonerated Ortho for its actions before, during, and after Moreland's attack on Todd and found

for Ortho on seven of the eight claims it was charged to consider. After considering the evidence at trial, the jury made the following findings of fact, none of which has been challenged by Todd:

- Ortho did not know nor should it have known that Moreland had a propensity for misconduct;
- Ortho acted reasonably under the circumstances to control Moreland;
- Ortho could not be expected to foresee Moreland's conduct based on the nature of his employment and related duties;
- Ortho took proper and effective remedial action after learning about the assault; and
- Ortho did not retaliate against Todd for complaining about the assault.

Pet. App. A-57 to A.62.

Despite the consistent findings in Ortho's favor, the District Court held Ortho liable for sexual harassment under Title VII because of the jury's affirmative answer to Question No. 13, which reads as follows:

> Did Mr. Moreland use his actual or apparent authority at Ortho Biotech to further his harassment of Ms. Todd, or was he otherwise aided in accomplishing his harassment by virtue of the position he had with Ortho Biotech?

Pet. App. A-61. Jury Instruction No. 37 — on which Question No. 13 was based and which was, in relevant part, requested by

Petitioner[3] — required the jury to impose strict vicarious liability so long as Moreland was found to have been "aided in accomplishing the harassment by the existence of his supervisory powers." Pet. App. A-68. Put most simply, this instruction and special verdict form required the jury to impose strict vicarious liability on Ortho simply because Moreland was a management-level employee at the time of the attack. *See* Pet. App. A-12.

The jury awarded Todd damages totaling $218,000 for lost past and future earnings and emotional distress, Pet. App. A-61 to A-62, and the District Court awarded attorneys' fees and costs totaling $207,572.24. Pet. App. A-33.

The Court of Appeals rejected the District Court's instruction to the jury regarding strict vicarious liability and reversed the Title VII judgment based on the jury's finding that "Ortho took timely and appropriate action to remedy another employee's attempted rape of Todd," and the court's legal conclusion that "such action is a complete defense to [Todd's] claims under Title VII . . . ." Pet. App. A-7.

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[3] This aspect of Instruction No. 37 was taken verbatim from the instruction proposed by Petitioner entitled "Employer Liability for Sexual Harassment of a Supervisor." *See* Plaintiff's Proposed Jury Instructions, at 35. Plaintiff's proposed instruction makes no mention of the necessity of finding either that Moreland was Petitioner's supervisor or that Petitioner believed him to be in her "chain of command." *See ibid.* Indeed, in another proposed sentence that was incorporated into Instruction No. 37, Petitioner described her claim in these words: "Ortho Biotech is liable for Mr. Moreland's sexual harassment *because he was a supervisor* at the time of the attack." *Ibid.* (emphasis added); *see* Pet. App. A-68.

REASONS FOR DENYING THE PETITION

Petitioner makes almost no effort to satisfy the requirements of Rule 10: she argues neither that the Court of Appeals' decision is in conflict with the decisions of other lower courts nor that this case presents an "important federal question." SUP. CT. R. 10(c). Rather, she relies exclusively on what she perceives to be the impact of this Court's recent decisions in *Faragher* and *Burlington* on the ruling by the Court of Appeals that Ortho was not vicariously liable for Moreland's acts of harassment because it was not negligent either in attempting to prevent or in acting to remedy Moreland's conduct. Because the holdings of *Faragher* and *Burlington* do not purport to apply to a one-time incident of harassment committed by a person outside the victim's "chain of command" — and because the reasoning employed in support of those holdings does not support any different result than was reached by the Court of Appeals in this case — the Petition should be denied.

Faragher *and* Burlington *Each Involved Supervisors in the Plaintiff's "Chain of Command"*

In *Burlington*, the Court considered whether a plaintiff could recover under Title VII when she had experienced threats of a tangible, adverse employment action, but no such action was taken. *See Burlington*, slip op. at 8. The threats in that case had been made by the person to whom her immediate supervisor reported. *See id.* at 2. The Court concluded that strict vicarious liability attaches when a supervisor commits sexual harassment resulting in a tangible employment action because such "actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates." *Id.* at 17. When tangible employment actions are threatened but not taken, the Court held, vicarious liability

attaches subject to a two-part affirmative defense, *see infra* at 10, so long as the actionable conduct is committed "by a supervisor with immediate (or successively higher) authority over the employee." *Id.* at 20.

Faragher involved actionable sexual harassment committed by the plaintiff's immediate supervisors. *Faragher*, slip op. at 1-2. The court concluded that, as in *Burlington*, vicarious liability, subject to an affirmative defense, was appropriate for sexual harassment committed "by a supervisor with immediate (or successively higher) authority over the employee." *Id.* at 29-30. In the course of reaching that conclusion, however, the Court noted that employer liability under Title VII for co-worker harassment has been uniformly judged by "a negligence standard," *id.* at 21, and that the rationale for imposing a stricter liability standard in the case of supervisors stemmed from the nature of the "'power to supervise — [which may be] to hire and fire, and to set work schedules and pay rates . . . .'" *Id.* at 26 (quoting Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 854 (1991); alteration in *Faragher*).

Neither *Faragher* nor *Burlington* purports to apply to the facts of this case — one-time harassment committed by a high-level employee who lacks "immediate (or successively higher) authority over" the victim. Nonetheless, the reasoning used by the Court to support liability "for some tortious conduct of a supervisor made possible by abuse of his supervisory authority," *id.* at 24, supports a clear distinction between supervisors who possess authority over the victim and those who, because they lack such power to hire and fire, more closely resemble co-workers. *Faragher* and *Burlington* support employer liability for harassment by a supervisor-level employee who is not in the victim's "chain of command" — who lacks the authority to cause a tangible employment action

— only if the employer is negligent (just as in the case of co-worker harassment), which is precisely the standard applied by the Court of Appeals in this case.

Faragher *and* Burlington *Involved Long-Running Incidents of Sexual Harassment*

In *Burlington*, the harassment involved repeated incidents that occurred over the course of nearly one year. *See Burlington*, slip op. at 2-3. Similarly, in *Faragher*, the harassment occurred over a five-year period. *See Faragher*, slip op. at 1. In this case, the harassment consisted of a one-time incident.

Petitioner suggests that because Moreland was "a supervisor," *Faragher* and *Burlington* require that vicarious liability attach to Ortho, subject to the affirmative defense announced in those cases. Application of that defense to a one-time case of harassment such as this would, quite simply, be nonsensical, and would verge on "automatic" liability — the very result that *Faragher* sought to avoid. *See Faragher*, slip op. at 26.

The affirmative defense announced in *Faragher* and *Burlington*

> comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Burlington, slip op. at 20; *Faragher*, slip op. at 30. The first part of the defense focuses on whether the employer "exercised reasonable care," *Faragher*, slip op. at 28 — *i.e.*, was the employer negligent? The second focuses on whether the victim "act[ed] with like reasonable care." *Id.*

Ortho does not dispute the propriety of a negligence-based standard for determining employer liability in a case such as this. But *Faragher* and *Burlington*'s additional focus on the possible negligence of the victim — which arose in the context of long-running incidents of sexual harassment — makes no sense when applied to a one-time incident of sexual harassment.

In adopting the affirmative defense announced in *Faragher* and *Burlington*, the Court focused on the need to serve the policies that Title VII was enacted to advance. *See, e.g., Faragher*, slip op. at 25 n.3, 26, 28-29. Among the concerns expressed by the Court were that (a) in 1964 (and again in 1991) Congress presumably legislated with awareness of the distinction between actions that fall within the scope of an individual's employment and those that do not (which are often labeled "frolics or detours") recognized in the common-law of agency, *see id.* at 20-21,[4] (b) under Title VII, as construed by the Court in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), "an employer is not 'automatically' liable for

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[4] In discussing what sorts of employee actions an employer would have been liable for under common law, the Court listed three examples of employee conduct. *See Faragher*, slip op. at 21. As an example of a "frolic" for which the employer should not be liable, the Court described the following incident: "the supervisor who . . . expresses his sexual interests in ways having no apparent object whatever of serving an interest of the employer." *Ibid.* A single incident of harassment such as that at issue in this case would appear to be the epitome of such a frolic for which the employer should not, without more, be liable.

harassment by a supervisor who creates the requisite degree of discrimination," *Faragher*, slip op. at 26, and (c) any theory of vicarious liability for supervisor misconduct "would be at odds with the statutory policy" if it failed to provide employers with an incentive to create an environment in which violations would be reported and remedied. *Id.* at 29. Application of the second part of the new affirmative defense to a one-time incident of harassment committed by a person who lacks authority over the victim would contravene each of these policies embodied in Title VII.

If the affirmative defense announced in *Faragher* and *Burlington* is applicable to a case such as this, an employer will, for all practical purposes, be automatically liable for its employee's "frolic" so long as the victim takes advantage of the procedures the employer has put in place for reporting of such incidents.[5] The employer may take every precaution to avoid such incidents, and may then take appropriate remedial action, but so long as the employee acts reasonably to avoid harm and reports the incident in a timely manner, the employer will be vicariously liable.[6]

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[5] *Cf.* Analysis: Supreme Court Increases Liability of Employers for Sexual Harassment But Creates Affirmative Defense, 158 Lab. Rel. Rep. (BNA) 296, 301 (July 6, 1998) (noting that, if the *Faragher* affirmative defense applies to a case such as this, "the second part of the defense probably could not be satisfied").

[6] In this case, Petitioner's conduct during the incident (including, for example, her decision to return to Moreland's hotel room) was not the subject of any jury findings. Ortho does not concede that Petitioner's conduct was reasonable; indeed, if this part of the affirmative defense applies to a case such as this, then that matter would need to be addressed either in the Court of Appeals or, perhaps, the District Court. Of more importance, however, is the fact that, in a case such as this, it would be inconsistent with the purpose of Title VII for a legal standard

If that is, indeed, the legal framework applicable to a one-time incident of harassment such as this, then Title VII provides no incentive for an employer to prevent or remedy such incidents because liability will attach regardless of the employer's conduct. Rather, the employer will have every incentive to disprove the alleged harassment, and an employee, knowing that this is the response he or she is likely to receive, will lose the incentive that currently exists to report such an incident. This cannot be the result that was intended by Congress or by this Court.

The anomalous result occurs only if the framework announced in the context of chronic, unremedied incidents of harassment is, as the Petitioner demands, applied to an unforeseen one-time incident of harassment. The objectives that the *Faragher* affirmative defense is designed to advance in the classic "hostile environment" context are, to the contrary, undermined if the defense — specifically, the aspect of the defense focused on the negligence of the employee — is applied in a case such as this. Accordingly, the affirmative defense must be limited to the circumstances that led to its creation.[7]

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to be imposed on the employer that would create a strong incentive for the employer to disprove an allegation of harassment and to attempt to shift the responsibility for such harassment to the victim. *See* Pet. App. A-12.

[7] The two cases that the Court remanded in light of *Faragher* also involved numerous incidents of sexual harassment. *See Reynolds v. CSX Transportation, Inc.*, 115 F.3d 860, 863 (11th Cir. 1997) ("six instances of inappropriate behavior" over "four or five weeks"), *cert. granted, vacated, and remanded*, 118 S. Ct. 2364 (1998); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1440-41 (10th Cir. 1997) (numerous incidents that occurred over two months), *cert. granted, vacated, and*

The Court of Appeals Has Already Conducted the Proper Analysis

Petitioner's request for remand rests on the premise that the Court of Appeals would benefit from an opportunity to reconsider its decision in this case in light of this Court's intervening decisions in *Faragher* and *Burlington*. What Petititioner fails to acknowledge, however, is that the Court of Appeals was given an express opportunity to defer its decision pending this Court's decision in *Faragher* (which it declined),[8] and, more importantly, that the analysis conducted by the Court of Appeals was conducted within the very same framework called for by this Court in *Faragher*.

In setting out the principles used to determine when an employer should be liable for the actions of its employees, *Faragher* notes that

> [t]he proper analysis . . . calls not for a mechanical application of . . . factors . . . , but rather an enquiry into the reasons that would support a conclusion that harassing behavior ought to be held within the scope of a supervisor's employment.

Faragher, slip op. at 19. The Court of Appeals conducted precisely that analysis, with express reference to the policies sought to be advanced by Title VII:

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remanded, 118 S. Ct. 2364 (1998).

[8] In her rehearing petition, in which she also sought en banc review, Todd expressly asked the Court of Appeals to vacate the panel decision and await this Court's decision in *Faragher*. *See* Appellee's Petition for Rehearing with Suggestion for Rehearing En Banc 1-2, 7-9. That request was denied.

> Viewing the question more broadly than the facts of this case, we think it contrary to both the intent of the statute and principles of agency law to impose liability upon an employer for the wrongful act of a supervisor acting well beyond the scope of his duty, particularly when the harassment complained of is a one-time act committed outside the workplace that the employer could not have anticipated. A strict liability standard will not encourage employers to promulgate anti-sexual harassment policies. A rigid standard of imputed liability will discourage employers from aggressively investigating complaints of sexual harassment by supervisors, complaints which, if proven true, will only redound to the employer's financial detriment. And such a standard fails to encourage and reward employers for taking prompt and effective remedial action to discipline sexual harassment offenders and to restore for the victim a workplace free of such discrimination.

Pet. App. A-12. Given the Court of Appeals' careful analysis of the reasons that support and oppose extension of vicarious liability to an employer on these facts, consistent with and as required by *Faragher*, a remand of this action would serve little purpose.

CONCLUSION

This Petition presents neither a conflict within the lower courts nor an "important federal question." Rather, it involves no more than Petitioner's misguided attempt to relitigate her case in light of this Court's recent decisions in *Faragher* and *Burlington*. Neither decision bears, or purports to bear, on the questions presented by a one-time incident of sexual harassment committed by an employee who was not the victim's

supervisor. Accordingly, Ortho respectfully asks that the Court deny the Petition for Writ of Certiorari.

Dated: August 21, 1998

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